UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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UNITED STATES OF AMERICA,

v. 17 Cr. 363 (GBD)

PEDRO GARCIA PENA,

Defendant.

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New York, N.Y.
October 24, 2018
12:10 p.m.

Before:

HON. GEORGE B. DANIELS

District Judge

APPEARANCES

GEOFFREY S. BERMAN
United States Attorney for the
Southern District of New York
BY: MATTHEW PODOLSKY
Assistant United States Attorney

ALEXANDER WILLSCHER
COREY OMER
ELIZABETH YOUNG
Attorneys for Defendant

ALSO PRESENT: Erika de los Rios, Spanish Interpreter

(In open court)

(Case called)

MR. PODOLSKY: Good afternoon, your Honor. Matthew Podolsky for the government.

THE COURT: Good afternoon.

MR. WILLSCHER: Hello, your Honor. Alexander Willscher, Corey Omer and Elizabeth Young from Sullivan & Cromwell for Pedro Garcia Pena.

THE COURT: Good afternoon. There are outstanding motions. Mr. Willscher, did you want to address any of the motions.

MR. WILLSCHER: Yes, if I may, I'd like to speak briefly, your Honor.

THE COURT: Yes.

MR. WILLSCHER: Your Honor, we are here in court today because the DEA, and the ATF, and a group of confidential informants manufactured a crime and lured a hard-working but naive man into a conspiracy that was imaginary.

The fact pattern here is all too common. In the past five years a dozen or so different federal judges have issued written opinions sharply criticizing the DEA and the ATF for these types of operations and for continuing to bring them, despite how problematic they are. We cite many of those judges, and there are cases in our papers, at pages 8 and 9, but really not a month goes by without a new judge commenting

on this. So last month, if I may bring up the case, your Honor, this is United States v. Paxton, it's Judge Gettleman from the Northern District of Illinois. Judge Gettleman writes -- this is a sentencing memo, and he writes right at the beginning that in 24 years on the bench he had never written such a sentencing memo, but he felt compelled to do it here, to express "the Court's disgust with the ATF's conduct in this case." He writes in the opinion that he fully agrees with the conclusions of other federal judges that these "tawdry and disreputable operations undermine legitimate law enforcement efforts in this country and generate great disrespect for those efforts." He goes on to say at the end of the opinion, "There is not a question in this Court's mind that none of these defendants would have even thought of engaging in a stash house robbery were it not for the ATF's scheme to entice them into doing so."

THE COURT: But that's the facts as they are alleged here. The facts as the government has represented is that Mr. Pena had already been involved in similar activity and was the one that suggested this activity in this case -- not this activity but another similar robbery that didn't come to fruition. And that's the evidence.

MR. WILLSCHER: That's their evidence as stated in the complaint, but their evidence as it's set forth in the discovery they provided is that this confidential informant and

a group of confidential informants had been targeting Mr. Garcia Pena for many, many months before the alleged communications in the complaint. He was a target here, and so the facts are the same, your Honor.

And Judge Gettleman noted in that opinion that because of the criticism from the bench in Chicago, in 12 different cases the government decided to drop any count of mandatory minimum and allowed all of the defendants across all 12 of those cases just to plead to a Hobbs Act robbery charge carrying no mandatory minimum, and many of those defendants have been sentenced to time served subsequent to that.

THE COURT: But none of them resulted in a dismissal of the indictment.

MR. WILLSCHER: That's correct, your Honor. We understand on the outrageous government misconduct that it's a very high bar, but our best evidence is the fact that there is a groundswell of support in writing now from these judges throughout the country and from the media, the defense bar, members of the public. And you wouldn't know that at all from the government's papers; they don't comment on any of those cases. Instead, at page 8 of the brief the government describes this practice, this investigatory practice, as eminently reasonable.

And if you read between the lines of the government's brief, what that says is at least here in the Southern District

of New York these cases are going to continue to be brought -- despite all the obvious problems with them -- unless and until the bench says enough is enough.

THE COURT: Well, I think the critical question is: Is this the appropriate case for that review? If the evidence would indicate that the defendant was already predisposed and had engaged in similar activity in the past and had suggested this kind of activity to the confidential informant.

MR. WILLSCHER: It's an excellent point, your Honor. So let's talk about the evidence of predisposition or really the lack of it.

This defendant has never been convicted before. There is no conviction for a drug crime. There is no conviction for robbery, for arms possession, there is none of that here. There is no allegation that he was a ringleader of some gang that does Hobbs Act robberies routinely and this was just a matter of the ATF needing to get him on his tenth robbery. This is not that case.

What this case is is the CI's targeted him because one of the CIs knew him back when he was living in the Dominican Republic. And it's not a huge community of Dominicans in New York City, and so he was targeted by a CI who needed to make a case in order to get out from a criminal sentence himself.

THE COURT: Well, how does that make it outrageous government conduct?

MR. WILLSCHER: It's outrageous because he is an innocent man, hard working, he has a job, he has a baby at home he is trying to support, he is working in a restaurant in the Upper West Side.

THE COURT: But, as I say, that's a different set of facts than the government is representing. Are there tape recordings in this case of a conversation?

MR. WILLSCHER: Yes, absolutely.

THE COURT: And are those conversations consistent with or inconsistent with his prior activity?

MR. WILLSCHER: They are consistent with our version of events. And, to be clear, if the case isn't dismissed, Mr. Garcia Pena is fully committed to trying this case on an entrapment defense, so that's how strongly he and we feel about the evidence here.

The only thing I expect the government to get up and talk about is that a year before the arrest Mr. Garcia Pena is on video in the back of a car while someone in the front of a car is selling a gun. And that is what is point three in our papers here, is that we made it very clear to the government that if we have to go to trial, we're going to, we're going to raise an entrapment defense; and today the only evidence about any event that the government has given us are those two videotapes, and last night the government sent over a PDF that someone had filed a police report that their gun had been

stolen.

But, again, we don't even know the date of the incident, much less any of the details about who the confidential informants were, what the circumstances of that case were. And we have been very clear and transparent that we're raising the entrapment defense. The government claims that they're working on it, but, you know, we have had this request out for months now, for eight months or more, and so far we've gotten pretty much zilch on that point.

THE COURT: A request for what?

MR. WILLSCHER: For any evidence about the -- the sole evidence the government will have of predisposition, which is that he was present when there when a gun sale happened. And we want the details around that, because clearly it was video recorded. It was an ATF operation, they had someone wearing a wire -- it was a confidential informant -- and they've given us nothing about that. And it's our testimony again that he was targeted to be in that car and lured into the car. And he wasn't comfortable, he didn't feel comfortable being there, and that's why for the next six months or eight months he ceases contact with the confidential informant.

THE COURT: Is this the same confidential informant or a different confidential informant?

MR. WILLSCHER: We don't know, the government won't tell us. But, your Honor, Mr. Garcia Pena ceased contact. And

when the CI called him back in connection with the new robbery that's in the complaint, he didn't have that CI's phone number any longer. Besides not having any desire to get in touch with the CI, he had no means to get in touch with him.

So, the government's claim in its papers and in the complaint that Mr. Garcia Pena was the impetus of this operation, it can't be right. And that's why you know we've asked for phone records, we've gotten the phone records, and we will be able to show that.

THE COURT: So, on what basis can I conclude that you have met a threshold showing here? Even if those issues are in dispute, that doesn't give me a basis to conclude that there is evidence of outrageous conduct or targeting the defendant because of his race or any other illegitimate reason.

MR. WILLSCHER: Let me come to the race in just a minute. You can dismiss this indictment without getting to any of the selective enforcement issues. And on the outrageous government conduct, there are two cases we cite in our brief -- a Third Circuit case, Twigg, and an Eighth Circuit case, Laard -- and I concede these are old cases, but the line they draw, and the way that they're different than subsequent Second Circuit cases and Southern District cases is that not only in those cases did the government create the opportunity for the defendant to get into trouble, but they actually manufactured the crime itself. And so every other one of the cases that the

government cites is not our case. We have a much more attractive case because here everything was made up; it was all imaginary. The robbery, the drugs, the guns, he didn't have any of that. He was just put up to it by the government, and we also don't have the predisposition evidence at all.

So, we are fully aware that this is a very heavy burden to meet on the outrageous government conduct, and, you know, I frankly will concede that that I think is why you have a dozen federal judges instead of dismissing those indictments they are instead sending written messages to the government that these cases are beneath the dignity of the DEA and the ATF, and you should stop bringing them in this district, and at least in Chicago and out in California the government has gotten that message. And here that hasn't happened yet, and they're going to keep coming.

You know, in our papers here we say just in the last three years there have been at least 15 more of these cases that we know of. And I will come to the racial aspect in a minute, but they're all targeting very discrete racial minorities. And it's not anything about the U.S. Attorney's office, but I don't see any supervision coming from the U.S. Attorney's office about these cases. I think they're reactive. An ATF agent shows up one day and says I just arrested five people, let's bring them to court, and the government then does that. OK? And so there is not any kind of high-level policy

decision being made by the government in this District about the concerns that all of these federal judges have expressed about these kinds of cases, and it's time for that, it really is.

So let me turn to the selective enforcement. Again, the government in its papers, it just asserts that the Supreme Court's decision in Armstrong is the standard that needs to be met here, and respectively that's just not correct.

You have decisions now from the Third Circuit in Washington, from the Seventh Circuit in Davis. And the Fourth Circuit, while it didn't need to really articulate the issue, they cited in the Hare opinion, they cited the Davis and Washington standards favorably.

So, in all those cases those courts and other district courts recognize that the Armstrong standard is really impossible to meet in this situation where you are alleging selective enforcement as opposed to selective prosecution. So, what they've said is we're not going to give the defendants just carte blanche to start a massive discovery campaign; instead what we're going to acknowledge is that district courts ought to have the ability to look into this if the government is not going to be paying attention itself, and there ought to be some limited discovery and we will go in baby steps; we will start off with a certain discrete category of discovery, and that has been granted. Contrary to the government's papers,

there have been discovery orders issued in Chicago, in Philadelphia, out in San Francisco, on selective enforcement claims. So, there is a road map here for the Court in terms of what is that appropriate first step to do. OK? And that's set forth in our Exhibit A, and we can cite you to the other court opinions that have granted -- or the orders that have granted that discovery.

But there is a road map here for how we go about looking into this. And the Second Circuit has not had the opportunity to decide whether Armstrong is the right standard to apply to a selective enforcement case. And respectfully I think that once it does, it will follow the reasoning of all of these courts, including the Third, the Seventh and the Fourth circuits, that it makes sense to have a bit more forgiving bar in a case of selective enforcement.

And here, your Honor, the government cites -- again it's just whistling past a graveyard. It cites to several cases from three or four years ago that have denied selective enforcement cases. And the implication from that is because, you know, back in 2014 a different judge in this court dismissed it, we know this is OK, we don't need to look at it or worry about it. But you do. I mean the most recent judge to have thought about this or issue an opinion on it prior to today was Judge Gardephe in 2015. And this was just after the Davis case came out of the Seventh Circuit; it was before the

Washington case was issued; so he didn't have the benefit of those court's reasoning. But, more importantly, since that time 15 more of these cases have been brought, and since that time I think all of them have been with the two minority groups that we talked about in our papers.

So, it's getting worse, it's not getting better, and so it's not enough just to say, well, we looked at precedent here and Judge Gardephe when he thought about it in 2015 didn't think there was enough, so therefore we can just rely on that. The fact is it keeps on getting worse and worse. The law is changing. More and more federal judges are recognizing that this is a major problem, and now there is a road map out there for how we can all as officers of the court be looking into this in a responsible and respectful way.

And one other thing about some of those other cases. Besides the Judge Gardephe case, many of the other cases the government cites where they dismissed the selective enforcement point, those were cases where the defendant -- they weren't able to make the showing that we did here.

Our client, we are fortunate that over the summer we had lots and lots of lawyers who spent hundreds of hours studying all of these cases in the last several years in this district. And ordinary lawyer, a member of the CJA panel, is not going to have the resources to do that, to conduct that inquiry. And Mr. Omer set forth all the work that went into it

in his declaration. It's a massive undertaking, but we have been prepared to do it. We're able to do it.

And it's no accident that in Chicago, where this has really been the other place that has been the epicenter of this impact litigation, it's because the University of Chicago Law School has really been dedicating a huge amount of time and resources into looking into it. And, not surprisingly, when they did that, and when the bench out there -- nine different district court judges held an evidentiary hearing on this point out there, because they all had these case, and they were all very concerned, and the result at the end of the day was the U.S. Attorney just pled all those cases out and for the most part those defendants got time served.

And I'm willing to guarantee that the U.S. Attorney's office is not going to be bringing any more of these fake stash house cases any time in the future out there.

THE COURT: Let me hear from the government.

MR. PODOLSKY: Thank you, your Honor. Let me respond to a few points, and I will try to be brief, because I know you're familiar with the briefing.

But let me start with this. I understand that people disagree about whether the government should be engaged in sting operations of any kind or of this particular kind, and that's a fine policy debate to have, but that's not why we're here in court today.

We're here in court today because this defendant was charged with showing up to a proposed robbery with firearms. That's what this is about. This isn't an opportunity for impact litigation. This isn't an opportunity for defense counsel to make a plea that the government should change its enforcement policies. That's just not why we're here.

And we can go back to first principles about this. The question is has the defense made a showing sufficient to get discovery into the government's other operations and enforcement principles so that they can make a claim of selective enforcement. And we can talk about outrageous government conduct separately as well. And the answer is no. And it's clearly no, because there must be some evidence -- there must be some showing of discriminatory intent that affected this defendant's case. The cases are very clear on that. Even in the Seventh Circuit -- which the defense relies on -- that is what Davis says. You don't just get to throw off some statistics and say it appears that minorities are involved in more cases than others, therefore you get discovery into the government's practices.

Judge Gardephe explains very clearly in Lamar recently. And frankly, your Honor, although the defense keeps pointing to the groundswell of oppositions by judges across the country to the practice of sting operations, when you actually look at the law, these exact claims have been brought

repeatedly in this District. Lamar, that was Judge Gardephe; Viera, Judge Ramos; Delacruz, Judge Forrest; Thompson, Judge Nathan, each of those cases the judges considered these exact set of claims, and denied them because the law does not permit dismissal on this type of outrageous government conduct claim. That's clear from the Second Circuit. There are multiple cases addressing this directly that are cited in our brief. And this kind of showing is not sufficient to get discovery into a selective enforcement claim.

And I will just mention, your Honor, that about eight months ago you considered these exact same claims in a case involving a defendant Pierre. Although that case the defendant did plead guilty before your Honor issued an actual order or opinion on the issue, in a February conference in that case you indicated your inclination not to dismiss. In fact, my understanding was you made it fairly clear you were not going to dismiss the indictment based on those claims, and in that case it did proceed to a guilty plea. These are not new claims. The courts have repeatedly rejected them because the law just does not support them.

Let me just quickly go to where your Honor went, first of all, with defense counsel, which is is this case even appropriate for these kinds of claims at all. And the answer is it isn't. Despite repeated assertions in the defendant's briefing, and in today, and in court today that this just is

the exact same as every other stash house robbery, the record shows this is just not the case where there is any arguable basis for claiming there was any kind of discriminatory effect or intent.

And how do we know that? Well, let's look at the sworn complaint. We can look at the defendant's own affidavit, which is just full of speculation and mischaracterization of facts. And I'm also happy to proffer a few facts about the history of the CS in this case, which I think your Honor asked about a few moments ago.

As defense counsel noted, there is sort of a case prior to this case which involved the sale of firearms from the defendant to the CS in this case. Despite the defendant's rank speculation in his affidavit, there wasn't some huge conspiracy of multiple CSs passing him from one to the other. Somehow he thinks the government had three or four different undercover individuals trying to target him. I have spoken to the agents on the case. It's just not accurate. The actual facts are that the CS in this case was somebody working with HSI -- not the DEA or ATF -- was introduced to Mr. Garcia Pena. Mr. Garcia Pena said he wanted to sell some firearms. I believe the defendant's own affidavit acknowledges that a friend of his asked him to sell the firearm. At that time it was one of ATF's purposes and missions to take illegal firearms off the street, so HSI contacted ATF, who arranged to purchase

these firearms and take them off the street. They did. It was video recorded. We have handed over those video recordings to the defense counsel. And that was the defendant in this case selling firearms of his own volition and own interests to someone he did not know was a government informant.

Now, the case would have ended there; he wasn't charged. ATF simply took the guns off the street, and that was it. But that wasn't enough for Mr. Garcia Pena. As is put forth in the sworn complaint, he then contacted and spoke with the CS again about robberies and in fact proposed his own robbery, an actual robbery.

And I can tell you that this investigation, this targeting began, DEA was brought in because they understood that Mr. Garcia Pena actually wanted to carry out an armed robbery, he wanted the CS to be a driver, and the government could not allow that to happen.

Now, when that robbery fell through, when that didn't happen, knowing Mr. Garcia Pena had spoken about a specific crime as well as other potential crimes he was interested in with the CS, the government at that point did choose to engage in the sting operation, because that was the safest way to prevent Mr. Garcia Pena from engaging in this kind of violent conduct that might actually endanger the safety of the community.

Now, Mr. Garcia Pena puts in his affidavit -- his only

reference to those discussions are that during the course of his conversations he may have been boasting. Well, that's not going to be the testimony at trial. But let's even assume that's the case. Let's assume for the moment that he was boasting about how much he wanted to commit crimes, about how he wanted to commit a stash house robbery, about how he wanted the CS to help him with that. That still doesn't amount to outrageous government conduct or selective enforcement, because it was the law enforcement's understanding that he did want to engage in those activities and that he was proposing them.

And actually let me make one other point about why this record is different than others. Look at the complaint. The defense has dug up -- and I understand there is a lot of work -- they dug up dozens of complaints on stash house robbery cases from this District, and you will note that in almost all of them the way the conduct starts is a CS reports that he is aware of someone who has in the past engaged in armed robberies or he has heard wants to, or might be involved with a crew.

There is nothing wrong with those cases, and I am not suggesting that there would be a cause for any discovery into those cases. But this case is different. The sworn complaint in this case is exactly as I've laid it out, that Mr. Garcia Pena, who had previously sold guns to an informant, then proposed additional robberies. He wasn't targeted. This wasn't the DEA out there fishing, trying to find someone to fit

a profile. This was someone who came to a government informant and sought out violent criminal conduct.

This is not an appropriate case for either a claim of outrageous government conduct, nor is it an appropriate case for a selective enforcement claim, even if -- even if there was going to be some softer than Armstrong standard applied.

Very, very quickly on that point on the law, every court as far as I'm he aware in this District to consider these claims have applied the Armstrong standard. That is the clear law in this District. But even if -- even if you were to look at the way that the other circuits that defense counsel cites approach this question, the circuits do not say, district court, you must go and order discovery in these cases. What they say is if there is indicia, if the defense has some basis to conclude that there is discriminatory intent above the statistics, then you may -- you have the discretion to proceed with discovery. That is what Davis says very, very clearly. That's the Seventh Circuit case. In case defense counsel had proffered that they had additional evidence of discriminatory intent as applied to that defendant, and the circuit said, district court, you are permitted receive that proffer, receive that evidence and choose whether to take additional steps. That is simply not the case here.

So, under any standard that applies, this is not the case for a selective enforcement claim; it's not the case for

an outrageous government conduct claim.

THE COURT: Yes, sir.

MR. WILLSCHER: Briefly, your Honor. I will mainly respond to the law, because with due respect to the assistant, there were some I think errors in describing the law. He began by saying that the standard is that there must be some evidence of discriminatory intent. And I mean if he is right that Armstrong applies in the Second Circuit, then that is maybe the test, but the Second Circuit has never held that; it's an open question here in the Circuit. And if you read the Washington case from the Third Circuit, just to be clear, it says distinct from what is required under Armstrong, a defendant need not at the initial stage -- which is where we are -- provide some evidence of discriminatory intent, or show that on the effect prong similarly situated persons of a different race or equal protection classification were not arrested or investigated by law enforcement. However, the proffer must be strong enough to support a reasonable inference of discriminatory intent and nonenforcement.

We have met that burden in spades here. The assistant just said statistics are not enough, you need more. That's not true. What else can we possibly have at this point when the government -- even though the ATF has given discovery in a whole bunch of other districts around the country, this government isn't giving it to us. We have done all we possibly

can to make that showing. So, the government is setting an impossible bar for us. Statistics are enough. They were enough in Davis, they were enough in Washington, they have been enough out in the Northern District of California. Those were enough in all of those cases. So, we have met that standard here clearly.

Now, the other thing the prosecutor said was that this is not the right vehicle because Mr. Garcia Pena initiated the conduct. And at the start of my remarks I told you why factually that's not right. But let's focus on the law for the minute. That very point was raised by the government both in Davis and in Washington, and in both those cases the Third Circuit and the Seventh Circuit rejected the argument. I am quoting now from the Washington opinion at page 222. The court writes, "The government emphasizes that they did not actually select or target any of the defendants, suggesting that a selective enforcement claim is categorically forestalled. This argument was raised in and rejected by Davis. We agree with the Seventh Circuit that although Berry himself initiated matters by asking the informant for robbery opportunities and then chose his own comrades, it remains possible that the government would not have pursued the investigation had he been white."

So this argument about the vehicle that the prosecutor is saying, it's been rejected by two courts of appeals in the

country, and in both those cases discovery had been granted.

And in terms of burden on the government here, for the most part they can start meeting the burden just by calling up their colleagues in the other districts and gathering what was produced from the ATF there in terms of policy handbooks from the ATF, how ATF is recruiting confidential informants.

I am on the CJA panel. I have all kinds of clients who are being signed up as confidential informants, and I have never had a white one who has been suggested that he go try to do fake stash house robberies.

So, it's important for us to know how the DEA is thinking about using confidential informants, how are they recruiting them. Once they have them, where are they putting them to work, on what kind of operations? And we know from these other cases is that evidence has been produced to defendants. It's under seal unfortunately, so we don't have it, but that's not burdensome at all for the government to give. And then the government has demographic information about its other defendants in these cases; it also has demographic information about the confidential informants. There is no way that they will share that with us absent a court order, but it's central part of our selective enforcement claim, that if in all of these cases, these fake stash house robbery cases, they're only using Dominican or Latino or black confidential informants, you know, due to various principles

that are recognized in academic and legal literature, you are almost guaranteed to get defendants from just those racial groups.

THE COURT: But, again, why is this case that case? Why doesn't the prior sale of firearms that he was involved in preclude that argument in this case?

MR. WILLSCHER: Well, because as Davis and Washington said, even if the government is right -- which the government is not right -- it doesn't matter, because the case might not have --

THE COURT: What is not right? I don't understand what you claim -- I don't hear you saying that he wasn't involved in a previous sale.

MR. WILLSCHER: I am saying that. But our argument, our understanding is that he was set up for that. This is the first time today -- despite eight months of asking the prosecutor for evidence about the gun sale -- and suddenly when his back is against the wall the government finally shares with us that there is an informant from a different agency -- not ATF. You know, we don't know anything about the identity of that person, the circumstances of how that person came to know Mr. Garcia Pena. But it's our client, and he said in his affidavit he believes he was targeted by that confidential informant.

It's no different. And we just have our hands tied

behind our back in responding to that because the government refuses to give us any of that evidence. And it's Brady evidence because it's exculpatory; it's also material to our defense, so it's Rule 16.

And the best they say in their papers -- they spent half a page addressing that argument, and essentially what they say is we're working on it.

THE COURT: Yes?

MR. PODOLSKY: Your Honor, I will just respond very, very briefly to just one or two points.

One, on the law, if your Honor hasn't already, we invite you to read the cases in both briefs. I think the cases are clear. Davis says this is a case where -- this is a Seventh Circuit case, the government says, look, the defendant in that case initiated and said he was interested in robberies, and what the court says is the defendants contend that they have additional evidence beyond that presented to district court that could support such a conclusion. What the court says is, OK, if the defense actually has evidence -- referring to the conclusion that that person was targeted based on race, not based on the fact that he was interested in doing crimes -- then the defense can come forward with it.

Even accepting that Davis is the right standard -- which it's not; it's never been adopted by any court in this District -- it still isn't right here, because there is

absolutely nothing -- nothing that the defense has been able to come forward with that would lead to a reasonable inference that race had any part in the selection of Mr. Garcia Pena as a defendant.

And in fact this case is different than the facts in Davis or in Washington, because this is a case where Mr. Garcia Pena himself, he didn't just say, oh, I'm somebody who is interested in robberies; he actually approached a CS and sold him guns. He then approached the CS again and said I would like to carry out a robbery with you, an actual robbery, and began planning it. That's contained in the sworn complaint. It's also reflected, at least the first part of the story -- you can understand it even from Mr. Garcia Pena's own affidavit, as long as you take away his pure speculation that everyone else he had met in between all of his friends and the CS in this case was also a CS, which is just purely speculation by Mr. Garcia Pena. There is simply no basis for it.

And frankly, your Honor, the defense has mentioned that it's no burden to the government. I'm not quite sure on what basis they are asserting that, but burden isn't the standard here in any case.

And the defense keeps making assertions that the government hasn't produced this, hasn't produced that. Well, the defense is not entitled to, among other things, prior statements of potential witnesses. They're not entitled to

know the entire background of potential witnesses in this case. And, in fact, it is far from the norm -- in fact it's the norm in this case -- to preclude defense from getting information about the identity of cooperators or CSs in advance of trial. The government has turned over all Rule 16 material, and in fact has provided additional information beyond what is required by Rule 16.

So there is simply no basis in this case -- frankly in any of these case -- as prior decisions of other judges in this district have made -- but particularly in this case there is simply no basis to entertain these claims.

THE COURT: Is there any other aspect of your motions that is still outstanding that needs to be addressed?

MR. PODOLSKY: Your Honor, there is additionally a claim regarding the 924(c) count related to the Hobbs Act conspiracy. That's clearly been answered by the Second Circuit in Barret, so I think there is nothing else to say about that.

THE COURT: You are not pursuing that any further beyond that?

MR. WILLSCHER: Your Honor, I would just ask, as the government did before Barrett that you hold your decision on that in abeyance. The defendant filed a motion on Monday for an en banc hearing, and with respect to that Second Circuit panel, that decision is in conflict with five other circuits, with prior Second Circuit case law and with the Supreme Court's

decision in Dimaya. So I don't know that I would take Barrett to the bank at this moment.

THE COURT: All right. Let me take it. I'm going to give you a short written decision on this. I think what I will do is I will schedule a pretrial conference. What else needs to be done once I decide this motion, if I deny the motion, other than setting a trial date?

MR. PODOLSKY: I think just a trial date and maybe a schedule for in limine motions and other deadlines.

THE COURT: All right. So then let me do this. Let's schedule a pretrial conference for January 9 at 10 o'clock. I will give you a decision in the next few weeks or days on this, and then we can start talking to each other about whether or not there is going to be a trial if it's not dismissed, or if I don't grant discovery. And we can talk on January 9 about a trial date. Otherwise, I will let you know whether or not I'm going to grant the motion and/or order further discovery on this issue.

All right, so January 9 at 10 o'clock.

MR. PODOLSKY: Your Honor, I know that there is a motion pending, but I would also move to exclude time under the speedy trial clock so we can continue any discussions with defense counsel and begin our preparations for trial.

THE COURT: Any objection?

MR. WILLSCHER: No, your Honor.

THE COURT: I will exclude the time, motions still pending. I will exclude the time until January 9th.

MR. PODOLSKY: Thank you, your Honor.

(Adjourned)